

4516-9410

RECEIVED

MAY 18 1978

MONT. DEPT. OF NATURAL
RESOURCES
IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE
STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

THE DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION OF
THE STATE OF MONTANA,

Plaintiff,

and

HAROLD DEPNER, ELIZABETH HAWLEY,
ROGER WEIST, AND ERNEST WEIST and
DANIEL WEIST, doing business as
MUDDY CREEK RANCH,

Plaintiff and
Intervenors,

-vs-

CRUMPLED HORN, a Montana corpora-
tion,

Defendant.

FILED
May 17, 1978
NINA GREYN
CLERK
BY KATE M. BERRY
DEPUTY CLERK

No. 7076

MEMORANDUM

This cause has been decided under the facts as I
heard, read, and analyzed them. The policy of this State as to
water policy controlled the Court and let it to its final
Conclusions. The policy is clear:

Section 89-866 (3), R.C.M. 1947

"It is the policy of this State and a purpose of
this act to encourage the wise use of the State's
water resources by making them available for
appropriation consistent with this act, and to
provide for the wise utilization, development,
and conservation of the waters of the state for
the maximum benefit of its people with the least
possible degradation of the natural aquatic eco-
systems. In pursuit of this policy, the state
encourages the development of facilities which
store and conserve waters for beneficial use, the
maximization of the use of those waters in Mont-
ana, for the stabilization of stream flows, and
for groundwater recharge." (Emphasis supplied)

To use to its capacity and to always conserve the
great ground water resources of our State and particularly the
ground water of the Muddy Creek aquifer and surrounding area

FILMED

NOV 16 1992

CASE # 4516

1 must be the scarlet thread underlining this Court's decision.

2 All parties agree that the area we are dealing with
3 is a source of much water. There are several creeks, marshy areas,
4 and a large confined underground aquifer; it is artesian. (see
5 Norbeck's report). Some wells flow at the surface, and others
6 need digging. Here is water, a great deal of water, and as is
7 most usual in such situations, the early users tend to be profligate
8 in their use. That use, even though not the most economical
9 must be closely examined and protected. But there are limits;
10 prior is not prior in the absolute sense that most inefficient
11 means of diversion will receive absolute autonomy. The word
12 "reasonable" is the bench mark of all water controversies. It
13 must be so here. see Section 89-2912 R.C.M. 1947.

14 The practical, efficient, and fair allocation of
15 ground water in the Muddy Creek aquifer means more time, more
16 tests, more supervision; a speedy settlement may not be the
17 best in the long run. Wayman V. Murray City Corporation 458 P 2
18 861 (Utah). We have therefore adopted interlocutory findings
19 and conclusions and will sign that type of Judgment.

20 DATED this 14 day of MAY, 1978.

21
22 ORIGINAL SIGNED BY
23 W. W. Lessley

24 W. W. LESSLEY, District Judge Presiding

25 CC: Church, Harris, Johnson & Williams
26 R. Keith Strong
27 P. O. Box 1645
28 Great Falls, Mt 59403

29 Loble, Pauly, Harlen, Picotte & Norris, P. C.
30 Lester H. Loble, II
31 833 North Last Chance Gulch
32 P. O. Box 176
Helena, Mt 59601

Robert T. Cummins
1 Last Chance Gulch
Helena, Mt 59601

Donald D. MacIntyre
Attorney at Law, 32 S. Ewing
Helena, Mt 59601

CASE # 4514

MacIntyre

4516-9410

RECEIVED

JUN 19 1978

MONT. DEPT. OF NATURAL
RESOURCES & CONSERVATION

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE
STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

THE DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION OF
THE STATE OF MONTANA,

Plaintiff,

and

HAROLD DEPNER, ELIZABETH HAWLEY,
ROGER WEIST, and ERNEST WEIST and
DANIEL WEIST, doing business as
MUDDY CREEK RANCH,

Plaintiff and
Intervenors,

vs.

No. 7976

CRUMPLED HORN, a Montana Corpora-
tion,

Defendant.

STATE EX. REL. CRUMPLED HORN,
a Montana Corporation,

Realtor,

vs.

THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION OF THE STATE OF
MONTANA,

Respondent.

FILED

June 16 1978
JINA GREY

BY: KAREN EDDY
DEPUTY CLERK

INTERLOCUTORY JUDGMENT AND DECREE

The above-entitled cause came on for trial before the
Honorable W. W. Lessley, sitting without a jury, on Wednesday,
March 8, 1978.

The Plaintiffs were represented by Mr. Robert T. Cummins,
1 North Last Chance Gulch, Helena, Montana, and by Mr. Donald D.
MacIntyre of the Department of Natural Resources and Conservation,
Helena, Montana. The Plaintiffs and Intervenors were represented
by Mr. R. Keith Strong, Attorney at Law of the firm Church, Harris

CASE # 4514

1 Johnson and Williams of Great Falls, Montana. The Defendant was
2 represented by Lester H. Loble, II, Attorney at Law of the firm
3 of Loble, Pauly, Harlen, Picotte and Norris, P. C. of Helena,
4 Montana.

5 The Court having considered the testimony, documentary
6 evidence, pleadings and other materials made and filed its
7 Findings of Fact.

8 IT IS HEREBY ORDERED, ADJUDGED, DECREED AND DECLARED
9 THAT:

10 1.

11 During September and October of 1976, the Defendant,
12 Crumpled Horn, was pumping water from the Muddy Creek Aquifer
13 pursuant to a provisional permit which was issued by the Depart-
14 ment of Natural Resources and Conservation and which was issued
15 subject to all prior existing water rights in the aquifer.
16 Plaintiffs and Intervenor have prior existing rights in the
17 Muddy Creek Aquifer.

18 2.

19 The pumping by Crumpled Horn affected Harold Depner's
20 house well and the well on state land leased by Daniel Weist,
21 and Ernest Weist so that they could not reasonably exercise their
22 prior existing water rights. Crumpled Horn shall pay to Harold
23 Depner the sum of Three Hundred Dollars (\$300.00) as the reasonable
24 expense required to obtain water from his house well. If
25 Crumpled Horn elects to continue pumping and as a precondition to
26 renewal of pumping Crumpled Horn shall pay to Daniel Weist and
27 Ernest Weist the sum of Two Thousand Five Hundred Twenty-Six
28 Dollars and Eight-six cents (\$2,526.86.) as the reasonable expense
29 of obtaining water from the well on the state land. It was not
30 proven that Plaintiffs and Intervenor could not reasonably exer-
31 cise their water rights in regard to the other wells herein in-
32 volved but future pumping by Crumpled Horn may adversely affect

1 those wells.

2 3.

3 The Defendant, Crumpled Horn, suffered no detriment
4 from any act or omission of the Plaintiff, the Department of
5 Natural Resources and Conservation, upon which Crumpled Horn
6 may recover damages. The cessation of pumping was originally
7 caused by a shutoff of electricity to the well and the failure
8 to resume pumping was a management decision of the Defendant,
9 Crumpled Horn. The investments made by Crumpled Horn in reliance
10 on the provisional permit were made as management decisions and
11 the property acquired has been used and is available for use by
12 Crumpled Horn.

13 4.

14 The extent of drawdown which will occur if Crumpled
15 Horn pumps according to its planned schedule is not known, however
16 drawdown caused by full pumping will be greater and will affect
17 a larger area than the drawdown caused by the pumping in 1976.
18 In order to protect the rights of all the parties the Court shall
19 retain jurisdiction over the pumping activities of Crumpled Horn.
20 Crumpled Horn shall be subject to a monitoring plan to be drawn
21 up by the Department of Natural Resources and Conservation, to be
22 paid for by Crumpled Horn and to be approved by the Court. The
23 pumping shall be allowed for a period to extend over two irriga-
24 tion seasons to determine the further and future changes in the
25 conditions of the aquifer.

26 5.

27 All parties shall pay their own costs and attorneys
28 fees.

29 DATED this 15th day of June, 1978.

30 ORIGINAL SIGNED BY
31 W. W. Lesjley

32 W. W. LESJLEY, District Judge Presiding

1 CC: Church, Harris, Johnson & Williams

2 R. Keith Strong

3 P. O. Box 1645

4 Great Falls, MT 59403

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7 Loble, Pauly, Harlen, Picotte & Norris, P. C.

8 Lester H. Loble, II

9 833 North Last Chance Gulch

10 Helena, MT 59601

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13 Robert T. Cummins

14 1 Last Chance Gulch

15 Helena, MT 59601

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18 Donald D. MacIntyre ✓

19 32 S. Ewing

20 Helena, MT 59601

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CASE # 4516

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IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF
THE STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

THE DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION OF
THE STATE OF MONTANA,

Plaintiff,

and

HAROLD DEPNER, ELIZABETH HAWLEY,
ROGER WEIST, and ERNEST WEIST and
DANIEL WEIST, doing business as
MUDDY CREEK RANCH,

Plaintiffs and
Intervenors,

-vs-

CRUMPLED HORN, a Montana Corpora-
tion,
Defendant.

No. 7076

STATE EX. REL. CRUMPLED HORN,
a Montana Corporation,

Relator,

-vs-

THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION OF THE STATE OF
MONTANA,

Respondent.

FILED
May 17 1978
NINA GREYN
CLERK
KAREN BROWN
DEPUTY CLERK

INTERLOCUTORY FINDINGS OF FACT AND CONCLUSIONS OF LAW

The cause was tried in the District Court of the Ninth
Judicial District of the State of Montana, in and for the County
of Teton at Choteau, Montana on the 8th day of March, 1978, before
the Honorable W. W. Lessley District Judge presiding.

Trial was upon the issues raised by the Complaint of
the Plaintiff, the Montana Department of Natural Resources and
Conservation, the Complaint of the Plaintiffs and Intervenors,
Harold Depner, Elizabeth Hawley, Roger Weist, and Ernest Weist,

1 and Daniel Weist, doing business as Muddy Creek Ranch, and the
2 Answer and Counterclaim of the Defendant herein, Crumpled Horn,
3 a Montana Corporation, and the supplementary Pretrial Order. The
4 Plaintiff was represented by Robert T. Cummins and Donald D.
5 MacIntyre. The Plaintiff and Intervenors were represented by
6 R. Keith Strong, Attorney at Law of the firm of Church, Harris,
7 and Johnson and Williams of Great Falls, Montana. The Defendant
8 was represented by Lester H. Loble, II, Attorney at Law of the
9 firm of Loble, Pauly, Harlen, Picotte and Norris, P. C. of
10 Helena, Montana.

11 The Court has considered the testimony, documentary
12 evidence, pleadings, and other materials, and the Court now
13 being advised in the premises, makes the following Findings of
14 Fact and Conclusions of Law, to-wit:

15 FINDINGS OF FACT

16 1.

17 Plaintiff, the Montana Department of Natural Resources
18 and Conservation (hereinafter referred to as the Department),
19 is an administrative agency of the State of Montana created,
20 organized and existing under the Provisions of Chapter 15, Title
21 82 A, Revised Codes of Montana, 1947.

22 2.

23 Plaintiff and Intervenors, Harold Depner, Elizabeth
24 Hawley, Roger Weist, and Ernest Weist, and Daniel Weist, doing
25 business as Muddy Creek Ranch, are individual ranchers or
26 ranching organizations who own land and operate wells in the
27 area north of Choteau, Montana.

28 3.

29 Defendant, Crumpled Horn is a corporation created, or-
30 ganized and existing under the laws of the State of Montana with
31 its principal office and place of business in Choteau, Montana,
32 and owning land in the area here concerned.

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4.

On January 25, 1976, the Department issued a Provisional permit to appropriate water to Crumpled Horn pursuant to Application No. 4516-g41-0 with a priority date from December 31, 1974, at 11:38 a.m., upon a finding that the criteria of Section 89-885, R.C.M. 1947 had been met; the source and point of diversion of the appropriation was ground water by means of two wells manifolded together at points in the NW 1/4 NW 1/4 of Section 12 and in the W 1/4 (1/2?) of Section 1, both in T. 25 N., R. 4 W., M.P.M., Teton County, Montana; water appropriated pursuant to the permit was to be used for new irrigation purposes from April 1 to October 31, inclusive of each year, and used on the following described lands: 160 acres in the NW 1/4 and 160 acres in the SW 1/4, both in Section 1; 40 acres in the NW 1/4 of Section 12; all in T. 25 N., R. 4 W., M. P. M., Teton County, Montana, and contained 360 acres, more or less; waters appropriated or to be diverted at the rate not to exceed 6.8 cfs or 3,000 gpm and a quantity of 720 acre-feet per annum. The diversion and distribution works for the appropriation were to be completed, and water to be applied to beneficial use on or before December 15, 1977. The permit was issued subject to all prior water rights, and upon the following limitations, terms, conditions, and restrictions:

1. The permit was issued subject to any final determination of existing water rights, as provided by Montana Law.
2. The permit was issued subject to the following conditions:
 - (a) That an adequate measuring device be installed so as to measure volume of water pumped;
 - (b) That the proposed appropriation does not contaminate the surface aquifer now used by the Objectors so that the water can continue to be used for domestic and stock purposes;

1 (c) That if insufficient flow is not attainable
2 from the shallow aquifer, that the Applicant cause
3 test wells to be drilled to the Madison limestone
4 formation and that the results of said test
5 wells along with the water quality analysis be
6 submitted to the Department of Natural Resources
7 and Conservation.

8 3. The permit was issued subject to all prior exist-
9 ing water rights in the source of supply.

10 5.

11 No person aggrieved by the final decision of the Depart-
12 ment with respect to the above-described Provisional Permit
13 requested a hearing before the Board of Natural Resources and
14 Conservation. No appeal was taken from the Department's final
15 decision as provided for in Section 89-8-100, R.C.M. 1947.

16 6.

17 Elizabeth M. Hawley is an owner of a well located in
18 T. 25 N., R. 4 W., M.P.M., SE 1/4 NE 1/4 SE 1/4 of Section 12.
19 Casing diameter is 6 inches O.D. with a registered well depth
20 of 100 feet, constituting a cement well pit, with a static water
21 level of 11 feet 8 inches. Well water since establishment of
22 the farm is used for household, cattle, horses, pigs, chickens,
23 other fowl, pets, garden, yard, and machinery. The rate of
24 pumpage is 10 gpm with a volume of 660 gph. The well was complet-
25 ed in February, 1944 and is located approximately 5 feet from
26 the initial well which was completed in 1914. The new well was
27 necessary because the wooden casing of the old well caved in.

28 That the Hawley well is more than 30 years old;
29 evidence indicates that wells of this type are depreciated out
30 by this time; she should not recover for pump and fitting and
31 labor for a new well. (Ex. 24)

32 7.

33 Harold I. Depner is the owner of two wells located in
34 T. 25 N., R. 4 W., M. P.M., Section 2, NW 1/4 SW 1/4 or the
35 NE 1/4 SW 1/4, the wells being located on or near the boundary
36 line. The one well, more commonly called the "barn well", was

1 built 44 feet deep with a 6 inch O.D. casing of galvanized steel,
2 open at the bottom, and was drilled on October 30, 1960. The
3 well, more commonly known as the "house well" is 42 feet deep,
4 4 inches in diameter, using a used oil well casing, has an open
5 bottom, yields 15 gpm with a 10 foot drawdown and was drilled
6 in 1946. These two wells are used for domestic purposes and
7 stockwater. Additionally, there are 4 other wells, all located
8 in Section 2 which are all located on Harold Depner's land when
9 he purchased the land, and the wells are used for hay meadow
10 irrigation.

11 That Depner's two wells are called the house and the
12 barn well; that the house well problem was attempted to be
13 solved by installing a submersible pump in the existing well;
14 that this didn't work; that they then lowered the drop pipe to
15 lower the drawing point of well; that Exhibit 16 to cover cost of
16 this procedure is a check for THREE HUNDRED NINETY-ONE DOLLARS
17 AND NINE CENTS (\$391.09) that the record does not allocate
18 respective costs of installation and lowering; that a fair
19 estimate here is THREE HUNDRED DOLLARS (\$300.00).

20 That the testimony concerning the barn well cost is
21 elusive; the record shows only a single item of TWO HUNDRED
22 EIGHTY-TWO DOLLARS AND FOUR CENTS (\$282.04) for costs of electri-
23 city installation (Exhibit 18); that costs of drilling, and of
24 pump are not given; that Crumpled Horn's testimony doesn't price
25 cost of saddle clamp; it is testimony that does not preponderate;
26 is not persuasive; therefore recovery is not allowed on the
27 claimed damage to the barn well.

28 8.

29 Roger J. Weist is the owner of two wells in the NE 1/4
30 NW 1/4 of Section 35, T. 26 N., R. 4 W., M.P.M., both wells are
31 78 feet deep. The casings are 4 1/2 inch O. D., 160 pound test,
32 P. V. C. plastic. From 68 feet to 78 feet there is a perforated

1 section with 5 rows of 3 1/8 inch holes. Static water level
2 was 0.6 feet but varies with the season. One well is located
3 inside a farrowing barn; it is used to supply pressure type
4 water inside the barn and a underground line outside to a hydrant.
5 If the water table is high enough, it also flows at the rate of
6 2 gpm into a pipe 11 inches in diameter by 80 feet long to provide
7 water to several pens of feeder pigs.

8 The other well is a house well. It is used for house-
9 hold purposes and to water a lawn and garden. Pumps on both wells
10 have a capacity of approximately 12 gpm. The barn well was
11 drilled March 30, 1972 and the house well in April, 1973.

12 That the Roger J. Weist wells are two in number; that
13 one is located inside a farrow barn and the second is a house
14 well and is used for domestic purposes and to water lawn and
15 garden; that it is claimed neither of the two wells flows
16 naturally; that no present damage or expense has been shown.

17 9.

18 The Montana Department of State Lands owns a well
19 located in the SE 1/4 SE 1/4, Section 36, T. 26 N. R. 4 W., M.P.M.
20 Daniel L. Weist is the lessee of the well. The well was drilled
21 by Mr. Ray Anderson of Choteau, Montana for the purpose of stock-
22 water use. The well was started on July 29, 1971. The size of
23 the hole drilled is 6 1/4 inch. The size of the casing is 4 1/2 inch
24 O.D., P.V.C. plastic 160 pound, depth to 102 feet. Perforations
25 were drilled from 82 feet to 102 feet on 4 sides with 3/8 inch
26 holes. Static water level is 9 feet at 30 gpm measured 30
27 minutes after pumping. Well developed by air for two hours.
28 Seal-tip packer at 42 feet. Present flow of water from 1 1/4 inch
29 plastic pipe is 3.7 gpm. The plastic pipe is tied into the
30 casing 10 feet from the top of the casing and then runs downhill
31 to a stock tank approximately 75 feet.

32

1 That the evidence as to present losses on the barn
2 well, house well, and bull pen is not clear, nor does it prepon-
3 derate to allow recovery.

4 That the evidence clearly shows the state land well
5 (a free flowing well dried up) and the damages incurred are:
6 TWO HUNDRED TWELVE DOLLARS AND EIGHTY CENTS (\$212.80) cost of
7 providing electrical service (Exhibit 8); ONE THOUSAND FOUR
8 HUNDRED FORTY DOLLARS (\$1,440.00) electricity for 10 years
9 (Exhibit 7); SIX HUNDRED FIFTY-EIGHT DOLLARS (\$658.00) cost of
10 pump (Exhibit 6); ONE HUNDRED NINETY-SIX DOLLARS (\$196.00)
11 electric waterer (Exhibit 8); and TWENTY DOLLARS (\$20.00) cement
12 under water (Exhibit 8) for a total of TWO THOUSAND FIVE HUNDRED
13 TWENTY-SIX DOLLARS AND EIGHTY CENTS (\$2,526.80); that the evi-
14 dence as to causation of the numerous other wells North of Muddy
15 Creek is scanty, unclear, and definitely does not preponderate
16 to allow damages at this time.

17 10.

18 That the claim as to odor, hard quality of water and
19 the necessity of installation of filters is not proved.

20 11.

21 A single well was drilled May 1976, to a depth of 70
22 feet by Crumpled Horn. The Crumpled Horn well and the wells of
23 the Plaintiffs Intervenor are all located in the aquifer in the
24 Muddy Creek Artesian Basin which occupies portions of several
25 townships north and east of Farmington in Teton County.

26 12.

27 The Pinedale Mountain outwash is the aquifer that
28 supplies domestic, stock, and irrigation water to wells on the
29 Burton Bench. The aquifer occurs at the surface along the
30 western edge of the Burton Bench from Farmington west to Ralston
31 Gap and from the vicinity of Choteau Airport north to Foster
32 Creek. Lake beds and glacial till overlay the outwash and are

1 the impermeable beds that confine water in the outwash under
2 artesian pressure. The aquifer is recharged by infiltration of
3 precipitation, snowmelt, and irrigation water in the area where
4 the outwash occurs at the surface. Water moves from west to
5 east under the confining beds. Some water leaks upward to Muddy
6 Creek where the stream has cut downward through the lake sediments
7 and till. Storage in the artesian portion of the Muddy Creek
8 Basin aquifer is approximately 170,000 acre-feet of water. The
9 recharge area contains about 260,000 acre-feet of storage.

10 13.

11 Crumpled Horn appropriated water for 27 days pursuant
12 to Beneficial Water Use Permit No. 4516-g41-0 between August 27
13 and September 23, 1976 when Crumpled Horn ceased pumping. The
14 amount of water pumped each day was 375 gpm, approximately 1.6
15 acre-feet per 24 hour period. Pumping was taking place 23 hours
16 a day. A deep well turbine pump with a maximum capacity of
17 500 gpm was used during the pumping operation.

18 14.

19 During the 27 day pumping period starting August 27, 1976
20 water levels dropped enough so that the flow may have been
21 affected on 6 nearby wells; owners of several of the affected
22 wells complained to the Department of lower water levels caused
23 by Crumpled Horn's pumping.

24 15.

25 Residual drawdown in wells known to have been affected
26 by pumping from the Crumpled Horn well include: (a) Harold
27 Depner's stock well with a claimed residual drawdown in excess
28 of 0.6 feet; (b) Elizabeth Hawley's house well with a claimed
29 residual drawdown of 8.3 feet; (c) State Land's stock well
30 (Daniel Weist, lessee) with a claimed residual drawdown of
31 greater than 1.17 feet; (e) Roger Weist's stock well with a
32 claimed residual drawdown in excess of 1.82 feet.

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Pumping water levels and recovery water levels from pumping periods were analyzed by standard techniques to determine the transmissivity and storage co-efficient of the aquifer periods. With these parameters known, the effects of pumping can be computed for various pumping stages, and various pumping periods. The extent of drawdown to be expected from further pumping by Crumpled Horn from a single well or by further pumping after completion of the wells permitted under Beneficial Water Use Permit No. 4516-g41-0 has not been quantitatively determined; however, drawdown will occur and it will occur on a magnitude of almost doubling the adverse affect.

During the fall of 1976 the irrigation plans for Crumpled Horn indicated that pumping would take place fifteen to twenty days in the fall, fifteen days in the spring, and thirty days during the growing season.

Pumping by Crumpled Horn during the 27 day period in 1976 had some effect on an area of approximately eight square miles. Projections indicate that pumping at the full rate planned by Crumpled Horn may effect an area of up to fifty (50) square miles, although the exact size is unknown due to unknown variables such as precise rate and areas of recharge and discharge and the effect of Muddy Creek.

A field inspection was conducted on September 9, 1976 by the Department of Natural Resources and Conservation to determine the extent of the adverse affects as a result of the pumping by Crumpled Horn. As a result of the investigation it was found that the drawdown caused by the pumping of Crumpled Horn was sufficient to terminate once flowing artesian stockwells.

1 The wells south of Muddy Creek suffered a lowering of static
2 water levels from 0.98 feet to 8.66 feet. As of October 4, 1976,
3 after pumping had ceased, the date of the second field inspection
4 by the Department of Natural Resources and Conservation, none of
5 the wells of the Plaintiffs and Intervenor had regained the
6 static water levels that were present before the pumping by
7 Crumpled Horn had commenced.

8 20.

9 As a result of the pumping by Crumpled Horn some of
10 the intervenors have had their existing water systems altered in
11 some few instances requiring expenditures on their part and
12 others may be faced with possible future problems in the exercise
13 of their prior water rights.

14 21.

15 Pumping by Crumpled Horn stopped when the electricity
16 went off and the pump shut down. The failure to resume pumping
17 during the Fall of 1976 was due to management decisions of
18 Crumpled Horn rather than a threat by the Department of Natural
19 Resources and Conservation to obtain an injunction. Crumpled
20 Horn did not resume pumping when so requested by the Department
21 at a time the Department wished to make test measurements on the
22 surrounding wells.

23 22.

24 The investments made by Crumpled Horn in reliance on
25 the provisional permit were made as management decisions, and
26 the same are still available for use and are capital improvements
27 to Crumpled Horn's property.

28 23.

29 Crumpled Horn has sustained no losses or damages as
30 the result of any act or omission of the Department of Natural
31 Resources and Conservation.
32

1 From the foregoing Findings of Fact, the Court makes
2 the following Conclusions of Law:

3 CONCLUSIONS OF LAW

4 I.

5 The cause of actions alleged by the Department of
6 Natural Resources and Conservation of the State of Montana and
7 the Plaintiffs and Intervenor, Harold Depner, Elizabeth Hawley,
8 Roger Weist, and Ernest Weist, and Daniel Weist, doing business
9 as Muddy Creek Ranch, are not res adjudicata; Plaintiff and
10 the Plaintiffs and Intervenor have standing to bring this
11 action; the District Court has jurisdiction over subject
12 matter of the issues raised in the Complaint of Plaintiff
13 pursuant to Title 93, Chapter 89, and Section 89-897, R.C.M.,
14 1947.

15 II.

16 Crumpled Horn's pumping pursuant to Beneficial water
17 Use Permit No. 4516-g41-0 has affected, does affect, and may
18 continue to affect prior appropriators in the same aquifer.

19 III.

20 Crumpled Horn is a later appropriator (junior appropriator)
21 in the same aquifer as the prior appropriators (senior
22 appropriators), Harold Depner, Elizabeth Hawley, Roger Weist,
23 and Ernest Weist and Daniel Weist, doing business as Muddy Creek
24 Ranch. The means of diversion of the senior appropriators from
25 the aquifer are subject to further evaluation. The pumping by
26 Crumpled Horn Corporation has affected the water table in the
27 Muddy Creek aquifer.

28 IV.

29 The appropriation by Crumpled Horn affects some of
30 the senior appropriators to the extent that it is not economical,
31 practical, or convenient for the senior appropriators, considering
32 their historical means of appropriation.

V.

Some of the prior appropriators cannot reasonably exercise their water rights under the present changed conditions caused by Crumpled Horn's appropriation from the same aquifer.

VI.

The Department of Natural Resources and Conservation has taken no unlawful action or caused any unlawful omission which entitled Crumpled Horn to recover compensation. The damages alleged by Crumpled Horn are a direct result of the voluntary actions of the corporation. Any detriment or damages suffered by Crumpled Horn were the result of its own corporate actions. Any investment made by Crumpled Horn pursuant to Provisional Water Use Permit was made at Crumpled Horn's own risk.

VII.

That Crumpled Horn shall pay to Mr. Harold Depner the sum of THREE HUNDRED DOLLARS (\$300.00) for a sound reasonable expenditure in cleaning the well and attempting to install a deep water pump because of the changed conditions caused by Crumpled Horn's junior appropriator.

VIII.

That Crumpled Horn shall pay to Daniel and Ernest Weist the sum of TWO THOUSAND FIVE HUNDRED TWENTY-SIX DOLLARS AND EIGHTY-SIX CENTS (\$2526.86) for sums necessary to be expended to provide electrical service, cost of pumping electrical water and cement under water.

IX.

That the permit under which the Crumpled Horn secured its junior appropriator rights in the area concerned was under a provisional permit granted by the Department.

X.

That this Court to properly protect and safeguard the rights of the prior appropriators, and to further grant full

1 utilization of the available water by the junior appropriator and
2 all appropriators here involved with the Muddy Creek aquifer re-
3 tains jurisdiction of this matter both as to the operation of
4 the Department and as to the various parties concerned. That
5 this retention of jurisdiction is to the end that the administra-
6 tion of water rights in this area may be protected and that the
7 fullest utilization of the ground water supply in the Muddy Creek
8 aquifer might not be seriously curtailed and that the full result
9 and purpose of our statute and policy of water law be carried
10 out. This means that the junior appropriator may proceed under
11 his provisional permit governed only by proper field procedures
12 of the Department and the prior rights involved and further
13 ordered of this Court.

14 XI.

15 Attorneys' fees are not allowable in the absence of
16 statute or agreement. There is no statutory or contractual basis
17 for the awarding of attorneys' fees.

18 Let judgment enter accordingly.

19 DATED this 16th day of May, 1978.

20
21 ORIGINAL SIGNED BY
22 W. W. Lessley

23 W. W. LESSLEY, District Judge Presiding

24 CC:

25 Church, Harris, Johnson & Williams
26 R. Keith Strong
27 Attorneys at Law
28 P. O. Box 1645
29 Great Falls, Mt 59403

30 Loble, Pauly, Harlen, Picotte & Norris, P.C.
31 Lester H. Loble, II
32 Attorneys at Law
833 North Last Chance Gulch
P. O. Box 176
Helena, Montana 59601

Robert T. Cummins
1 Last Chance Gulch
Helena, Mt 59601

Donald D. MacIntyre
Attorney at Law
Dept. of Natural Resources & Conservation
Helena, Mt 59601

CASE # 4514

MacIntyre

4516-9410

RECEIVED

JUN 19 1978

MONT. DEPT. OF NATURAL
RESOURCES & CONSERVATION

1 IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE
2 STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

3
4 THE DEPARTMENT OF NATURAL
5 RESOURCES AND CONSERVATION OF
6 THE STATE OF MONTANA,

7 Plaintiff,

8 and

9 HAROLD DEPNER, ELIZABETH HAWLEY,
10 ROGER WEIST, and ERNEST WEIST and
11 DANIEL WEIST, doing business as
12 MUDDY CREEK RANCH,

13 plaintiff and
14 intervenors,

15 vs.

No. 7976

16 CRUMPLED HORN, a Montana Corpora-
17 tion,

18 Defendant.

19
20 STATE EX. REL. CRUMPLED HORN,
21 a Montana Corporation,

22 Realtor,

23 vs.

24 THE DEPARTMENT OF NATURAL RESOURCES
25 AND CONSERVATION OF THE STATE OF
26 MONTANA,

27 Respondent.

FILED

JUNE 16 1978
JINA GREY

BY: KAREN EDGEMAN

CLERK

28 INTERLOCUTORY JUDGMENT AND DECREE

29 The above-entitled cause came on for trial before the
30 Honorable W. W. Lessley, sitting without a jury, on Wednesday,
31 March 8, 1978.

32 The Plaintiffs were represented by Mr. Robert T. Cummins,
1 North Last Chance Gulch, Helena, Montana, and by Mr. Donald D.
MacIntyre of the Department of Natural Resources and Conservation,
Helena, Montana. The Plaintiffs and Intervenor were represented
by Mr. R. Keith Strong, Attorney at Law of the firm Church, Harris

CASE # 4514

1 Johnson and Williams of Great Falls, Montana. The Defendant was
2 represented by Lester H. Loble, II, Attorney at Law of the firm
3 of Loble, Pauly, Harlen, Picotte and Norris, P. C. of Helena,
4 Montana.

5 The Court having considered the testimony, documentary
6 evidence, pleadings and other materials made and filed its
7 Findings of Fact.

8 IT IS HEREBY ORDERED, ADJUDGED, DECREED AND DECLARED
9 THAT:

10 1.

11 During September and October of 1976, the Defendant,
12 Crumpled Horn, was pumping water from the Muddy Creek Aquifer
13 pursuant to a provisional permit which was issued by the Depart-
14 ment of Natural Resources and Conservation and which was issued
15 subject to all prior existing water rights in the aquifer.
16 Plaintiffs and Intervenor have prior existing rights in the
17 Muddy Creek Aquifer.

18 2.

19 The pumping by Crumpled Horn affected Harold Depner's
20 house well and the well on state land leased by Daniel Weist,
21 and Ernest Weist so that they could not reasonably exercise their
22 prior existing water rights. Crumpled Horn shall pay to Harold
23 Depner the sum of Three Hundred Dollars (\$300.00) as the reasonable
24 expense required to obtain water from his house well. If
25 Crumpled Horn elects to continue pumping and as a precondition to
26 renewal of pumping Crumpled Horn shall pay to Daniel Weist and
27 Ernest Weist the sum of Two Thousand Five Hundred Twenty-Six
28 Dollars and Eight-six cents (\$2,526.86.) as the reasonable expense
29 of obtaining water from the well on the state land. It was not
30 proven that Plaintiffs and Intervenor could not reasonably exer-
31 cise their water rights in regard to the other wells herein in-
32 volved but future pumping by Crumpled Horn may adversely affect

1 those wells.

2 3.

3 The Defendant, Crumpled Horn, suffered no detriment
4 from any act or omission of the Plaintiff, the Department of
5 Natural Resources and Conservation, upon which Crumpled Horn
6 may recover damages. The cessation of pumping was originally
7 caused by a shutoff of electricity to the well and the failure
8 to resume pumping was a management decision of the Defendant,
9 Crumpled Horn. The investments made by Crumpled Horn in reliance
10 on the provisional permit were made as management decisions and
11 the property acquired has been used and is available for use by
12 Crumpled Horn.

13 4.

14 The extent of drawdown which will occur if Crumpled
15 Horn pumps according to its planned schedule is not known, however
16 drawdown caused by full pumping will be greater and will affect
17 a larger area than the drawdown caused by the pumping in 1976.
18 In order to protect the rights of all the parties the Court shall
19 retain jurisdiction over the pumping activities of Crumpled Horn.
20 Crumpled Horn shall be subject to a monitoring plan to be drawn
21 up by the Department of Natural Resources and Conservation, to be
22 paid for by Crumpled Horn and to be approved by the Court. The
23 pumping shall be allowed for a period to extend over two irriga-
24 tion seasons to determine the further and future changes in the
25 conditions of the aquifer.

26 5.

27 All parties shall pay their own costs and attorneys
28 fees.

29 DATED this 15th day of June, 1978.

30 ORIGINAL SIGNED BY
31 W. W. Lesley

32 W. W. LESLEY, District Judge Presiding

1 CC: Church, Harris, Johnson & Williams

2 R. Keith Strong

3 P. O. Box 1645

4 Great Falls, MT 59403

5

6

7 Loble, Pauly, Harlen, Picotte & Norris, P. C.

8 Lester H. Loble, II

9 833 North Last Chance Gulch

10 Helena, MT 59601

11

12

13 Robert T. Cummins

14 1 Last Chance Gulch

15 Helena, MT 59601

16

17

18 Donald D. MacIntyre ✓

19 32 S. Ewing

20 Helena, MT 59601

21

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CASE # 4514

4516-2410

RECEIVED

MAY 18 1978

MONT. DEPT. OF NATURAL
RESOURCES
IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE
STATE OF MONTANA, IN AND FOR THE COUNTY OF TETON

THE DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION OF
THE STATE OF MONTANA,

Plaintiff,

and

HAROLD DEPNER, ELIZABETH HAWLEY,
ROGER WEIST, AND ERNEST WEIST and
DANIEL WEIST, doing business as
MUDDY CREEK RANCH,

Plaintiff and
Intervenors,

-vs-

CRUMPLED HORN, a Montana corpora-
tion,

Defendant.

FILED
May 17, 1978
NINA GREYN
CLERK
BY KATE M. [unclear]
DEPUTY CLERK

No. 7076

MEMORANDUM

This cause has been decided under the facts as I
heard, read, and analyzed them. The policy of this State as to
water policy controlled the Court and let it to its final
Conclusions. The policy is clear:

Section 89-866 (3), R.C.M. 1947
"It is the policy of this State and a purpose of
this act to encourage the wise use of the State's
water resources by making them available for
appropriation consistent with this act, and to
provide for the wise utilization, development,
and conservation of the waters of the state for
the maximum benefit of its people with the least
possible degradation of the natural aquatic eco-
systems. In pursuit of this policy, the state
encourages the development of facilities which
store and conserve waters for beneficial use, the
maximization of the use of those waters in Mont-
ana, for the stabilization of stream flows, and
for groundwater recharge." (Emphasis supplied)

To use to its capacity and to always conserve the
great ground water resources of our State and particularly the
ground water of the Muddy Creek aquifer and surrounding area

CASE # 4514

1 must be the scarlet thread underlining this Court's decision.

2 All parties agree that the area we are dealing with
3 is a source of much water. There are several creeks, marshy areas,
4 and a large confined underground aquifer; it is artesian. (see
5 Norbeck's report). Some wells flow at the surface, and others
6 need digging. Here is water, a great deal of water, and as is
7 most usual in such situations, the early users tend to be profligate
8 in their use. That use, even though not the most economical
9 must be closely examined and protected. But there are limits;
10 prior is not prior in the absolute sense that most inefficient
11 means of diversion will receive absolute autonomy. The word
12 "reasonable" is the bench mark of all water controversies. It
13 must be so here. see Section 89-2912 R.C.M. 1947.

14 The practical, efficient, and fair allocation of
15 ground water in the Muddy Creek aquifer means more time, more
16 tests, more supervision; a speedy settlement may not be the
17 best in the long run. Wayman V. Murray City Corporation 458 P 2
18 861 (Utah). We have therefore adopted interlocutory findings
19 and conclusions and will sign that type of Judgment.

20 DATED this 16 day of MAY, 1978.

21
22 ORIGINAL SIGNED BY
W. W. Lesley

23
24 W. W. LESLEY, District Judge Presiding

25 CC: Church, Harris, Johnson & Williams
26 R. Keith Strong
27 P. O. Box 1645
Great Falls, Mt 59403

28 Loble, Pauly, Harlen, Picotte & Norris, P. C.
29 Lester H. Loble, II
833 North Last Chance Gulch
30 P. O. Box 176
Helena, Mt 59601

31 Robert T. Cummins
1 Last Chance Gulch
32 Helena, Mt 59601

Donald D. MacIntyre
Attorney at Law, 32 S. Ewing
Helena, Mt 59601

CASE # 4514

EXHIBIT "A"
BEFORE THE DEPARTMENT
OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

1-22-74

IN THE MATTER OF APPLICATION
FOR BENEFICIAL WATER USE
PERMIT NO. 4516-g-41-0, BY
CRUMPLED HORN

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on January 5, 1976, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

ORDER

1. The Applicant's Provisional Permit No. 4516-g41-0 is granted allowing the appropriation of 3,000 gallons per minute of water and not to exceed 720 acre-feet per annum, to be diverted and used for irrigation on one 360-acre tract, located in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 12, Township 25 North, Range 4 West, and the W $\frac{1}{2}$ of Section 1, Township 25 North, Range 4 West, M.P.M., Teton County, Montana. The length of the season of use shall be April 1 to October 31, inclusive, of each year. The two wells shall be drilled to a depth of 140 feet and manifolded together. If this alternative fails to supply sufficient water for use by the Applicant, then the Applicant may drill the well to the Madison Limestone, with adequate protection by cementing, and the diameter of the well shall be no more than 15 inches.

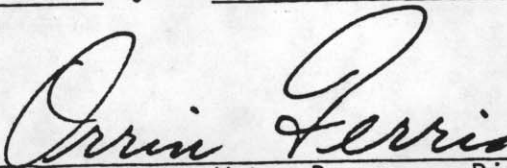
2. The Applicant's permit is granted subject to the following conditions:

- a. That an adequate measuring device shall be installed so as to measure the volume of the water pumped;

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- 4516
- b. That the proposed appropriation does not contaminate the surface aquifer now used by the Objectors so that water can continue to be used for domestic and stock purposes; and
- c. That if insufficient flow is not obtainable from the shallow aquifer, that the applicant cause test wells to be drilled to the Madison Limestone Formation and that the results of said test wells along with a water-quality analysis be submitted to the Department of Natural Resources and Conservation.
3. The permit is granted subject to all prior existing water rights in the source of supply.

Done this twenty-second day of January 1976.



Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

NOTICE: Section 89-8-100, R.C.M. 1947 provides that a person who is aggrieved by a final decision of the Department is entitled to a hearing before the Board of Natural Resources and Conservation. A person desiring a hearing before the Board pursuant to this section must notify the Department in writing within ten (10) days of the final decision.

Address: Department of Natural Resources and Conservation
Natural Resources Building
32 South Ewing
Helena, MT 59601

CASE # 4516

BEFORE THE BOARD OF NATURAL
RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

In the Matter of the)
Application for Beneficial) PROPOSAL FOR DECISION
Water Use Permit No. 4516-g41-0)

PARTIES

Pursuant to the Montana Water Use and Administrative Procedure Acts, after due notice, a hearing on objections to the above-entitled application was held in the courtroom of the Teton County Courthouse, Choteau, Montana, at 1:30 p.m., on Wednesday, October 15, 1975, Donald MacIntyre, Hearings Officer, presiding.

Crumpled Horn, a Montana corporation, was represented by its attorney, Lester H. Loble, II, of Loble, Picotte & Pauly, P.C. Testimony was given on behalf of Crumpled Horn by its consultant, Leslie E. Chalmers.

The following parties submitted timely objections to the application and appeared personally and through their counsel, R. Keith Strong, of Church, Harris, Johnson and Williams, attorneys at law: Mrs. Elizabeth M. Hawley, Lee and Marguerite Revear, Mr. and Mrs. Lloyd S. Pedersen, Roger J. Weist, Arthur H. Weist, Ernest A. Weist, and Ernest and Dan Weist d/b/a Muddy Creek Ranch. The following parties submitted timely objections and appeared personally: Marion A. Averill, Edmund A. Alzheimer, Isabelle Truchot, Alex J. Truchot, John L. O'Keefe, Herold I. Depner, Joel Otness, Ronald Otness and Lyle Otness. The following

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parties submitted timely objections to the application but did not appear: Nevin Caskey, Paul J. Alzheimer, Mr. and Mrs. Ralph B. Caskey and Edwin J. Schilling.

Testimony was taken and exhibits were received. Peter J. Norbeck testified for the Department. Leslie E. Chalmers, consultant to the Crumpled Horn, testified on behalf of Crumpled Horn. The following objectors testified: Lloyd S. Pedersen, Ronald Otness, Mrs. Elizabeth Hawley, Lee Revear, Herold Depner, Roger Weist, Dan Weist (for the Muddy Creek Ranch). All parties, whether represented by counsel or not, were permitted to cross-examine all witnesses. Upon the termination of testimony closing statements were made.

All exhibits offered by the Department, the Applicant and the objectors were received into evidence. In addition, the Hearings Examiner, upon request and motion of the counsel for the Applicant, ordered that the Declarations of Vested Groundwater Rights, previously filed with the Department by the objectors were a part of the record of this proceeding.

MOTIONS

At the close of the case of the objectors, R. Keith Strong on behalf of his clients, moved that the application be rejected for failure to serve proper notification on affected parties and because the application was premature.

Notice of application is governed by Section 89-881(1), which requires publication and service by certified mail. The publication requirements were satisfied in full and no objection was made to these. Notice by certified mail is required upon

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applicants or holders of permits who, "according to the records of the department, may be affected by the proposed appropriation." Section 89-881(1). As of the time the mailed notices were sent, the files and records of the Department indicated that appropriators of water or applicants for or holders of permits within one mile of the proposed place of appropriation should receive notice by certified mail. The notice was sent and the statutory requirements satisfied. In addition, it should be noted that many of the objectors live more than one mile from the Applicant. Their written objections and personal appearance signified that notice was timely received by them, whether received by certified mail or not. Therefore, the motion to dismiss for failure to comply with the notice requirements of the statute is denied.

It would be an unreasonable burden to require each applicant to demonstrate beyond a shadow of a doubt, particularly in cases of groundwater appropriations, that his needs will be completely satisfied. This would, in effect, require the Applicant to have made the appropriation and have expended all of the money in connection therewith, before learning whether he is entitled to an appropriation in the first instance. This is contrary to the requirements of the Montana Water Use Act.

Therefore, the motion to dismiss the application because it is premature is likewise denied.

As required by law, the Hearings Examiner makes the following Proposed Findings of Fact, Conclusions of Law and Order to the Administrator, Water Resources Division, Department of Natural Resources and Conservation.

PROPOSED FINDINGS OF FACT

The Application

1. On December 30, 1974, the Applicant submitted application no. 4516-g41-0 to the Department, seeking to appropriate 3,000 gallons per minute for a period from April 1 to October 31 inclusive with a maximum water use of 720 acre feet per annum. The water is to be diverted by means of two 15-inch wells drilled to a depth of 140 feet or to the Madison Limestone aquifer, if the shallower well does not produce sufficient water. From the wells, the water would be pumped through an irrigation system. The wells would be located in the NW $\frac{1}{4}$ of Sec. 12, Lots 3 and 4, the S $\frac{1}{2}$ NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ of Sec. 1, T. 25 N., R. 4 W., M.P.M., County of Teton, and would be used to irrigate the lands so described for the purpose of raising small grains and alfalfa. The total proposed irrigated acreage is 360 acres.

Facts Proved Through Testimony on behalf of the Department

2. Peter J. Norbeck testified, on behalf of the Department, that from October 6 through October 8, 1975, he interviewed the officers and consultant of the Applicant, the objectors and examined the installations of the objectors insofar as he was able to do so, soil and weather conditions permitting. He also took photographs of some of the installations and these were introduced into evidence.

3. Alex Truchot has a well in the NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 23, T. 26 N., R. 4 W. The well is controlled and has a flow of 5 to 10 gallons per minute. It is located at point 7 on the Dept. Ex. 20.

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4. John L. O'Keefe has a well in the SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 1, T. 25 N., R. 3 W. The well has a continuous, uncontrolled flow of 3 to 5 gallons per minute. The water flows into a stock tank and then overflows onto the ground. Dept. Ex. 1 and 2. This well is located about 5 to 6 miles from the Applicant's proposed point of diversion.

5. Joel Otness has a well located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Sec. 1, T. 26 N., R. 4 W. It is a shallow well with a rusted casing. It has a continuous, uncontrolled flow, but the volume of the flow was not estimated. It is located at point 2 on Dept. Ex. 20.

6. Roger Weist has two wells in the NW $\frac{1}{4}$ of Sec. 14, T. 25 N., R. 3 W. One well has a static water level of 4.9 feet below the top of the well casing. The other, one-quarter mile to the east of the first well, is tapped and has a flow rate of 10 to 15 gallons per minute when open. It is not shown on Dept. Ex. 20.

7. Herold Depner has six wells in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Sec. 2, T. 25 N., R. 4 W. The wells are located at point 3 on Dept. Ex. 20. Exhibit 6 shows the stock well north of the house (NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 2) which has a continuous, uncontrolled flow of 5 to 10 gallons per minute. Dept. Ex. 7 and 8 show the home-stead well, east of the Mr. Depner's house. The static water level is one foot below the casing. On January 10, 1964, Mr. Depner filed a Declaration of Vested Groundwater Right with the office of the State Engineer, showing that all of his wells are flowing artesian wells and that 750 acre feet per year are used on 12 acres of land, for personal use and stock water.

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8. Lloyd S. Pedersen has two wells located in the SW $\frac{1}{4}$ of Sec. 7, T. 25 N., R. 3 W., shown at point 4 on Dept. Ex. 20. One is a domestic well with the water level 18.55 feet below the top of the casing. The other is located in the NW $\frac{1}{4}$ of Sec. 7 and will flow at a rate of 70 gpm when the control valve is open according to the Declaration of Vested Groundwater Right filed by Mr. Pedersen with the Department on January 10, 1964.

9. Arthur H. Weist has one well near his house located in the NW $\frac{1}{4}$ of Sec. 35, T. 26 N., R. 4 W. in which the static water level is 3.31 feet below the top of the casing. He also has two uncontrolled, continuously flowing wells in the SW $\frac{1}{4}$ of Sec. 35. No estimate could be obtained of the amount of water flowing. However, Mr. Weist on his Declaration of Vested Groundwater Right (filed January 10, 1964) stated that each well on his property produces 750,000 gallons per year. The two uncontrolled, continuously flowing wells produce together 1,500,000 gallons of water per year. These wells are shown at point 5 on Dept. Ex. 20.

10. Roger Weist has a domestic well in the NW $\frac{1}{4}$ NE $\frac{1}{2}$, Sec. 35, T. 26 N., R. 4 W. The static water level is .87 feet below the casing. A stock well in the barn has a continuous, uncontrolled flow of 3 to 5 gallons per minute. It flows into a 7-inch pipe (Dept. Ex. 17) and is used to water 200 hogs. These wells are located at point 6 on Dept. Ex. 20.

11. Ernest Weist has three wells located near his house, one west of his house which has a flow of 10 gallons per minute but which is capped. There is one in the barn south about 200 feet from his house with a "Pride of Farm" control. A well east

CASE # 4516

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of the house has a continuous, uncontrolled flow of less than 5 gallons per minute. The water flows into a stock tank and then overflows onto the ground and into a ditch nearby. Dept. Ex. 3. All of the three wells are located in the NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 36, T. 26 N., R. 4 W. Additionally, there is a well in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Sec. 25, T. 26 N., R. 4 W. with a continuous flow of approximately 1 gallon per minute because the valve on the pipe is closed to that amount. Dept. Ex. 9. Near the southern boundary of the NW $\frac{1}{4}$ of Sec. 30, T. 26 N., R. 3 W. there is a well with a flow rate of 3 to 5 gallons per minute and it is capped. Dept. Ex. 10 and 11. In the NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 24, T. 26 N., R. 4 W. there is a well with a continuous, uncontrolled flow into a stock tank of 5 gallons per minute. Dept. Ex. 12. The tank overflows into a creek a few feet from the tank. There is a stock well on state land leased by Mr. Weist in the SE $\frac{1}{4}$ of Sec. 36, T. 26 N., R. 4 W. The static water level is 6 to 7 feet below ground level. However, a trench nine feet deep has been dug to the well and a pipe buried therein, so that the well is tapped from the side. Dept. Ex. 14. The water then flows into a stock tank at the rate of 5 to 10 gallons per minute (Dept. Ex. 16) and overflows into the Muddy Creek. Dept. Ex. 15. These wells are located at point 7 on Dept. Ex. 20.

12. Marion A. Averill has a well located in the NW $\frac{1}{4}$ of Sec. 6, T. 25 N., R. 3 W. Dept. Ex. 13. There is a continuous, uncontrolled flow from the well to and through the house, to a stock tank and then to water pigeons. Dept. Ex. 18. The flow is less than 5 gallons per minute continuous uncontrolled flow.

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Mr. Averill's well is located at point 8. Dept. Ex. 20.

13. Mr. and Mrs. Ralph B. Caskey have a well located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Sec. 4, T. 25 N., R. 3 W. The static water level is 14.45 feet below the casing. There is an old well in the NE $\frac{1}{4}$ of Sec. 5, T. 25 N., R. 3 W., no longer used which has a small trickle of water. Dept. Ex. 19. Mr. and Mrs. Caskey's wells are located at point 9 in Dept. Ex. 20. There is also shown on the Declaration of Vested Groundwater Right, filed January 10, 1964 by Mr. Caskey, an uncontrolled, flowing artesian well yielding 3,888,000 gallons of water per year to water 25 acres and a shelter belt.

14. Mrs. Elizabeth M. Hawley has a well located in the NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 12, T. 25 N., R. 3 W. It is located by the house. The static water level is 2.24 feet below the casing which is located ten feet below the ground level. Mrs. Hawley's well is located at point 10 on Dept. Ex. 20.

15. Herold I. Depner has a well (Dept. Ex. 27) located in the SE $\frac{1}{4}$ of Sec. 11, T. 25 N., R. 4 W. which has a continuous, uncontrolled flow via a ditch into Spring Coulee. Dept. Ex. 26. No estimate of flow was given. Mr. Depner's well is located at point 11 on Dept. Ex. 20.

16. Mr. Lee Revear has a well located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Sec. 14, T. 25 N., R. 3 W., which is capped and has a flow rate when open of 10 to 15 gallons per minute. Dept. Ex. 28. Mr. Revear's well is not shown on Dept. Ex. 20.

17. The "Barringer" well is located in the NE $\frac{1}{4}$ of Sec. 33, T. 26 N., R. 3 W. It is sealed with cement. There is presently a continuously flowing seepage of approximately 10 to 20 gallons

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per minute eastward into Muddy Creek. There is some erosion but no danger of washing out the well. Barringer well is located at point 13 on Dept. Ex. 20.

18. The wells described in proposed Findings of Fact numbers 4, 9, 10, 11, 12 and 17 as "continuously flowing" flow 24 hours a day the year round. The total volume of flow ranges from 20,925,000 gallons to 30,900,000 per year or 64.1 acre feet to 94.78 acre feet per year. Adding to this Mr. Depner's statement that he withdraws 750 acre feet of groundwater each year (from his Declaration of Vested Groundwater Right filed January 10, 1964) to the other totals produces a total unchecked continuous flow of 814.18 to 844.78 acre feet per year. A significant portion of this total flow is lost and wasted. The photographic exhibits demonstrate that much of the water from the continuously flowing wells runs onto the ground and into the creeks and coulees.

19. Mr. Norbeck further testified that the Madison Limestone formation is approximately 1,875 feet below the ground. The water quality is slightly to moderately saline. The other aquifer, nearer the ground level, is an 8 foot artesian sand and gravel aquifer. Cross-section C-C' on Dept. Ex. 22 and 23 show that this aquifer continuously underlies these farmlands and that artesian wells will flow two to three miles south of the Crumpled Horn property. Cross-section D-D' outcrops near the road north of Farmington and thus artesian wells will flow (Dept. Ex. 22 and 24) two miles east of Crumpled Horn property. An irrigation well visited by Mr. Norbeck in the E½ of Sec. 19, T. 25 N., R. 5 W., was pumped while he was there. He concluded that there was a transmissibility of 26,000 gallons per day per foot. However,

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the sand and gravel under the Applicant's property may be cleaner and may have a higher transmissibility. In determining the effect of pumping he used 20,000 gallons per day per foot with a storage ratio of 10×10^{-3} . Based on these assumptions the two wells will have a capability of pumping 750 gallons per minute with a 42 foot draw down. The total radius of influence would extend two miles north of the north boundary and two miles south of the south boundary of the property owned by the Applicant. The radius of influence measured by a draw down of 5 feet is one and one-half miles, and the radius of influence measured by a draw down of 10 feet is one-half mile, north of the north boundary and south of the south boundary of the property owned by the Applicant. In calculating the groundwater and storage, there was shown to be an area of 10 by 15 miles or approximately 100,000 acres with a 15% porosity. Mr. Norbeck estimated that there is 120,000 acre feet in storage between the surface and 160 feet. Mr. Norbeck estimated that 500 gallons per minute could be pumped from each well or 1,000 gallons per minute from the two wells maximum pumping capability.

20. If the application were granted and all of the water were drawn from the aquifer located between the surface and 160 feet below the ground, no wells would dry up, but the water level of some wells would fall.

Facts Proved by Testimony on behalf of the Applicant

21. Testimony on behalf of Crumpled Horn was given by its consultant, Leslie E. Chalmers. Mr. Chalmers was born and raised in the vicinity of the farm owned by Crumpled Horn and the parcel which is proposed to be irrigated under the application. Farming practices

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in the locale are generally dry land farming. Irrigation significantly increases crop yields. Sprinkler irrigation increases crop yields by three or four times. This has been proven by sprinkler irrigation on other portions of property owned by Crumpled Horn in the same area. The increased yields permit the financing of the sprinkler systems and the drilling of the well to the necessary depth, whether that be 140 feet or to the Madison Limestone. Two circular sprinkler systems will be used. The maximum water use for watering alfalfa is 720 acre feet per year. During those years when small grains are planted maximum water use is approximately 360 acre feet per year. If an insufficient flow is not obtainable from the shallow aquifer, there are three options: (1) A small reservoir, (30 acre feet) located on the land described in the application, could be filled and used to operate the sprinklers at a time of high water demand. The reservoir site would be in those corners of the land not reached by the sprinkler systems. (2) The land could be sprinkled prior to the onset of the growing season and following harvesting. The soil is a Lakes type soil, a heavy clay and will hold 8 inches of moisture. (3) The two wells could be connected to a common manifold. Until further test wells are drilled, however, it is not possible to determine at this time which, if any, of these alternatives will be successful.

22. If all of these alternatives fail, then a well can be drilled to the Madison Limestone. The well diameter will initially be 15 inches, but will be reduced at successive intervals until a 6 or 8 inch well is punched into the Madison Limestone. The well will be sealed with cement to prevent seepage

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from other aquifers into the well or seepage from one aquifer to another.

23. There is no saline seep located on this land. It was the opinion of Mr. Chalmers that saline seep might well be caused by present cropping practices which allow land to lie fallow, rather than using a rotational crop. As the water content of the soil increases, the salts in the soil are dissolved in the water and washed to the surface. The use of a rotational crop of small grains and alfalfa, together with an efficient and controlled sprinkler system should prevent the increase of water content in the soil. Furthermore, the deep-rooted alfalfa crop should have the salutary benefit of reducing the water content of the soil. Water efficiency use of a sprinkler system is 80% as opposed to 20% to 25% achieved by irrigation. A sprinkler system is used to supplement the rainfall, to provide the water that rainfall does not, and can be precisely metered to achieve this result. Rotational cropping plus a carefully managed sprinkler system should reduce or eliminate the danger of saline seep.

24. Mr. Chalmers has made a study of the area entitled "Study of Teton Water". The recharge area, which recharges the aquifer underlying his land and the land of others, including the objectors, is 100 square miles. There is sufficient recharge so that the level of water in the aquifer will be sufficient for all existing uses as well as for his proposed use.

25. Approximately four miles south of Applicant's proposed wells, Applicant has a 15-foot well from which it pumps at the rate of 450 gpm to operate a sprinkler system. The well is located in the northeast corner of Sec. 30, T. 25 N., R. 4 W. The

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operation is, in all significant respects, identical to the proposed operation. No other wells in the area have been affected by the pumping from this well.

Facts Proved by Testimony on behalf of the Objectors

26. Certain of the persons filing objections testified in the matter. Lloyd Pedersen testified and marked on Objectors' exhibit A (an aerial photo) the land owned by Crumpled Horn. Mr. Pedersen rents land south, west and east of Crumpled Horn. The light spots on Objectors' exhibit A marked with a green "X" are lakes or puddles which are full during wet years. Places of saline seep are marked with a green "O". Mrs. Hawley, due south of him one mile, has an outcropping of saline seep. He has farmed the land since 1939. He does not irrigate. He testified that the well on his property described as flowing by Mr. Norbeck is no longer flowing. Although Mr. Pedersen together with Mrs. Pedersen filed an objection stating four separate objections, he did not testify in support of any of those objections.

27. Mr. Ronald Otness testified that he is a farmer, owning land east of the county road shown on Objectors' Exhibit A. He said he first started to know of the saline seep 8 years ago. He assumes that it comes from water traveling underground. He marked a blue "X" in the southwest corner of his property showing a patch of saline seep. Mr. Otness did not testify in support of his written objection that his property rights or his interests would be adversely affected by the proposed application.

28. Mrs. Elizabeth Hawley testified and marked on Objectors' Exhibit A a red "X" for the well. The well is located among farm buildings west of and adjacent to the county road. She agreed

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with Mr. Norbeck's description of the well. She testified that in dry years, such as 1973 and 1974 the water level in the well dropped two feet. In 1936, she testified, that she had understood from her parents (she did not measure it herself) that the water level fell 20 feet. Mrs. Hawley did not testify in support of any of the four grounds for objection specified in her written objections.

29. Mr. Lee Revear testified that his property was one mile south and one mile east from the Applicant's property. He said that there was no saline seep on his home place but there was some seep on land owned by him about one mile from the land to be irrigated under the application. He agreed with Mr. Norbeck's description of his wells. He has noticed that saline seep grows during wet years and shrinks during the dry years. Mr. Revear did not testify in support of any of the foregrounds for objection specified in his written objections.

30. Herold I. Depner testified that he had saline seep on spots of his land. He has flood irrigated 480 acres of land in the past. He stated that in his opinion soil conditions do not take to irrigation. He stated that run-off from both his land and from the land of Crumpled Horn has caused the loss of 47 acres. He felt that land has improved since strip farming was used and the less saline seep has resulted from this practice. He did not know what caused saline seep except to say that water must cause it. He did not testify in support of any of the items specified in his written objection.

31. Roger J. Weist testified that Mr. Norbeck's description of his wells was accurate. His land lies north and west of the Applicant's land. There is saline seep on his father's land (Arthur H. Weist). Saline seep has existed as long as he has

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remembered and has remained the same throughout the time. He feels that water movement causes saline seep. He did not testify in support of his written objections.

32. Dan Weist is a partner in the Muddy Creek Ranch which lies north of the Crumpled Horn property, adjoins the Herold I. Depner and Arthur H. Weist property. Mr. Norbeck's testimony was accurate in the description of his wells and those of his father. Mr. Weist did not testify in support of his written objections.

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880, Revised Codes of Montana, 1947, a permit is required to appropriate groundwater.

2. There are unappropriated waters in the source of supply.

3. The rights of prior appropriators will be protected if the permit is conditioned to protect those rights.

4. The proposed means of diversion is adequate.

5. The proposed use of water for production of small grains and alfalfa are beneficial uses.

6. The criteria for issuance of a permit set forth in Section 89-885, R.C.M. 1947, have been met.

7. The Application for Beneficial Water Use Permit should be granted in accordance with the provisions of Chapter 8 of Title 89 of the laws of the State of Montana.

From the foregoing findings of fact and conclusions of law, the Hearings Examiner hereby makes the following proposed order.

PROPOSED ORDER

1. That the Applicant's permit be granted to allow the appropriation of 3,000 gallons per minute, not to exceed 720

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acre feet per annum, to be used on one 360 acre tract located in the NW $\frac{1}{4}$ of Sec. 12, T. 25 N., R. 4 W., and Lots 3 and 4, the S $\frac{1}{2}$ NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ of Sec. 1, T. 25 N., R. 4 W., M.P.M., County of Teton, State of Montana; the length of the season of use shall be from April 1 to October 31 inclusive; the two wells shall be drilled to a depth of 140 feet and may, if circumstances require, be manifolded together and/or a reservoir may be constructed on the described lands to store water in order to have it available during the peak use period of the irrigation season; if these alternatives fail to supply sufficient water for use by the Applicant, then the Applicant may drill a well to the Madison Limestone with adequate protection by cementing. The diameter of the wells shall be no more than 15 inches.

2. The Applicant's permit is granted subject to the following conditions: an adequate measuring device must be installed so as to measure the flow of water.

3. The Applicant's permit is granted subject to all prior existing rights.

This is a proposed order and will become final upon acceptance by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to this Proposed Order shall be filed with the Department within ten (10) days of receipt of the same. Upon receipt of any written objections to this Proposed Order, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this _____ day of November, 1975.

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Donald MacIntyre, Hearings Examiner